BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

In the Matter of	)	
	)	
	)	
1998 Biennial Regulatory Review-- Streamlining of Mass Media Applications, Rules, and Processes	)	MM Docket No. 98-43
	)	
	)	
Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)	MM Docket No. 94-149

TO: The Commission

PETITION FOR RECONSIDERATION

Covenant Network (Covenant or WRYT), CWA Broadcasting, Inc. (CWA or WFBR), and David M. Lister (Lister or KRNQ), by their attorney, and pursuant to Section 1.429 of the Commission's Rules, hereby respectfully seeks reconsideration of paragraphs 77-90 of the "Report and Order" adopting final rules in the above-captioned proceeding, FCC 98-281, released October 22, 1998, published in the Federal Register on December 18, 1998, 63 Fed. Reg. 70040-70051. Covenant, CWA and Lister hereby requests the Commission to reconsider its amendment of Sections 73.3534 and 73.3598 of the Commission's Rules placing a three-year

"cap" on broadcast station construction periods, and retroactively applying that "cap" to construction permits granted over three years ago. In support whereof, the following is shown:

Preliminary Statement

1. Covenant is licensee of daytime-only AM Broadcast Station WRYT, Edwardsville, Illinois, which it purchased in July, 1997, and is permittee of nighttime facilities for WRYT (also which was acquired in July, 1997). CWA is permittee of FM Broadcast Station WFBR, Cambridge, Maryland. Lister is permittee of FM Broadcast Station KRNQ, Keokuk, Iowa. All three parties hold construction permits which were initially granted more than three years ago. CWA is an African-American owned entity. Covenant is Roman Catholic lay apostolate.

2. Section 1.4(b)(1) provides that, for purposes of computation of time in notice and comment rulemaking proceedings, public notice of FCC 98-281 occurred when publication in the Federal Register took place. As noted above, FCC 98-281 appeared in the Federal Register on December 18, 1998, Volume 63, Number 243, Pages 70040-70051.

3. Section 1.429(d) permits a petition for reconsideration to be filed within 30 days of public notice.

In this case, the 30th day subsequent to December 18, 1998 was Sunday, January 17, 1999. Pursuant to Section 1.4(j) of the Rules, the due date for this petition became Tuesday, January 19, 1999, as Monday, January 18, 1999 was the Martin Luther King, Jr. federal holiday. Therefore, this petition is timely.

Grounds for Reconsideration

4. The Commission's radical amendment of Section 73.3534 of the Rules constitutes a "changing of the rules in the middle of the game" for reasons which appear to be based solely on the Commission's own convenience. As a result, despite the fact that Covenant, CWA and Lister expended substantial amounts of time and money in an attempt to construct KZXA and KEFE, in reliance on the regulatory scheme in place when they acquired those construction permits, the Commission would place an arbitrary time limit on placing both stations in operation, and would require Covenant, CWA and Lister to forfeit both construction permits, and all of the time and money spent on both, should they fail to meet that arbitrary time limit. This raises questions as to both administrative due process and the "takings" provision of Amendment 5 to the federal Constitution.

5. The fundamental unfairness of this regulatory situation is readily apparent. The petitioners expended time and money in good faith reliance on Commission rules and regulations in existence when the WRYT nighttime, WFBR and KRNQ construction permits were acquired. Petitioners could not reasonably foresee the radical changes to Section 73.3534 adopted by this new group of Commissioners. It goes without saying that investors will invest money in a regulated industry such as broadcasting only when they can be assured of a stable regulatory environment. The changes to Sections 73.3534 and 73.3598 "pull the rug out from under" Petitioners, and do not serve the public interest because they are contrary to the public interest inherent in a stable regulatory environment.

Legal Considerations

6. The Supreme Court of the United States ruled that the federal government may not change "rules in the middle of the game" where the effect of those rule changes was to injure private parties and at the same time releasing the federal government from its own obligations. ***United States v. Winstar Corporation***, 518 U.S. 839, 135 L. Ed. 2d 964, 1008-1010 (1996). While ***Winstar*** dealt with Congressionally-implemented changes to accounting rules governing savings

and loan associations, the principle enunciated in that case governs other regulated industries: don't change your rules in the middle of the game.

7. Further, a construction permit is a form of a property right, and this has been recognized by the courts. For example, in ***L. B. Wilson, Inc. v. FCC***, 170 F.2d 793 (D. C. Cir. 1947), it was stated that:

> While a station license does not under the Act confer an unlimited or indefeasible property right [citation omitted] the right is limited in time and quality by the terms of the license and is subject to suspension, modification or revocation in the public interest- nevertheless the right under a license for a definite term to conduct a broadcasting business requiring- as it does- substantial investment is more than a mere privilege or gratuity. A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. We set forth in the margin quotations from decisions of the Supreme Court which support these statements and also provisions of the Communications Act itself which recognize that a broadcasting license confers a private right although a limited and defeasible one. [footnote omitted]

8. The Court in ***Wilson*** went on to cite the predecessor of current 47 U.S.C. §316 to confirm that its use of the word "license" also applied to "construction permit". The result of ***Wilson*** was that a unilateral modification of a license by the Commission, without permitting the license holder its right to administrative due process, was an unconstitutional taking proscribed by Amendment 5 to the federal Constitution.

9. Therefore, the Commission's abolition of current Section 73.3534 without any provision for construction permit holders such as Petitioners to have a full and fair opportunity to demonstrate to the Commission that they are entitled to one or more additional extensions of their construction permits constitutes an unconstitutional taking of a private property right which is proscribed by the Fifth Amendment.

10. As an additional consideration, it is totally unfair to allow new permittees a three year period, without affording permittees such as Petitioners a similar three year period to complete construction. Were the Commission to treat all of its broadcast permittees in a fair and equitable manner, it would declare that a three year construction period would obtain for all permittees, commencing on February 16, 1999 and continuing until February 16, 2002. If the Commission were really concerned about merging administrative convenience with administrative due process and fundamental fairness, it would magnanimously grant a three year construction period for all permittees--and not foreclose the possibility of more time for permittees such as Petitioners who have devoted substantial time and money to a project, only to be arbitrarily denied

additional time. This disparity in treatment would be found by a reviewing court to constitute reversible error. ***Melody Music, Inc. v. FCC***, 345 F.2d 730 (D. C. Cir. 1965).

11. The new rule uniformly hurts parties such as CWA and Covenant, without taking into consideration problems unique to their situations. CWA completed the construction of its station in 1997, but has unable to commence broadcasting because a station on its frequency has not moved to a new frequency, which was the condition of the allocation of Channel 232A to Cambridge (Channel 248A was allocated in lieu of Channel 232A at nearby Salisbury, Maryland). Does the new rule mandate taking away CWA's construction permit when a station which is required to move before CWA can commence program test operations does not vacate its channel? The Commission's staff has interpreted the Commission's rules that a Form 302-FM application is not acceptable for filing until the filing station has commenced program test authority. In the case of Covenant, which desires to commence nighttime operation, problems beyond its control with a transmitter site inherited from the former owner of WRYT have prevented it from completing a four-tower directional antenna system, and the Commission's current freeze on filing major change applications to AM stations

have stymied it from changing transmitter sites, which now appears mandatory for it to commence nighttime operation. Yet, under the new rule, which affords no opportunities for the Commission's staff to take into consideration individual problems and needs, WRYT will lose its current nighttime authorization.

12. The foregoing demonstrates the problems with new Sections 73.3534 and 73.3598, which objective is merely to effectuate "administrative convenience", with no regard for the greater public interest or the needs of broadcasters who seek in good faith to try to initiate broadcast service to serve the public. The abolition of current Section 73.3534 and amendment of Section 73.3598 is simply wrong, and must be abolished or suitably revised.

Conclusion

13. As has been demonstrated herein, the Commission, in attempting to develop a rule for administrative convenience, failed to realize that the "defeasible property right" inherent in a construction permit held by a party such as Petitioners would be trampled as a result. It is simply lacking in fundamental fairness to "change the rules in the middle of the game". Petitioners expended time and money based on the rules they found when they entered the

game; it is fundamentally unfair of the Commission to change those rules in such a way as to adversely affect them (and others similarly situated with them). If the Commission wishes to change its rules to govern construction permits granted for the first time after October 22, 1998, it is free to do so. However, there are administrative due process and Fifth Amendment "takings" problems inherent in the retroactive application of such a rule. The availability of an FCC Form 307 application and the opportunity to make a showing pursuant to current Section 73.3534 must continue to be made available to all permittees whose original construction permits were granted prior to October 22, 1998.

WHEREFORE, Petitioners urge that reconsideration **BE GRANTED**, and that the Commission either **RESCIND** new Sections 73.3534 and 73.3598 of the Commission's rules, or **REVISE** Sections 73.3534 and 73.3598 so that their original provisions continue to apply to construction permits granted prior to October 22, 1998.

Respectfully submitted,

COVENANT NETWORK
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By _____

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